UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 32 -- August Term, 1981

Argued: September 3, 1981

Decided: January 5, 1982

Docket No. 81-7099

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SALVATORE INCORVAIA,

Plaintiff-Appellant,

v.

HELLENIC LINES LTD.,
"Grigorios C-IV",

Defendant-Appellee.

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UNITED STATES COURT OF APPEALS
FILED
JAN. 5, 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Before: NEWMAN and KEARSE, Circuit Judges, and EGINTON,* District Judge.

*The Honorable Warren W. Eginton of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from a judgment of the District Court for the Eastern District of New York (Edward R. Neaher, Judge) according a stevedore's compensation lien priority over a longshoreman's attorney's lien for fees in a negligence action when the shipowner and the stevedore are the same entity.

Reversed and remanded.

Irving Bushlow, Brooklyn, N.Y., for plaintiff-appellant.

Robert Alexander Hulten, New York, N.Y. (Edwin K. Reid, Zock, Petrie, Reid & Curtin, New York, N.Y., on the brief), for defendant-appellee.

NEWMAN, Circuit Judge:

The trilateral relationship among longshoreman, stevedore, and shipowner generates an apparently limitless array of legal issues. In Valentino v. Rickners Rhederei, G.M.B.H., SS Etha, 552 F.2d 466 (2d Cir. 1977), a longshoreman's negligence action against a vessel owner, we considered whether the lien of the longshoreman's attorney for his fee has priority over the stevedore's lien for its workmen's compensation payments when the recovery in the negligence action is insufficient to satisfy both liens. Having resolved that issue in favor of the attorney's lien, we now find the same issue recurring with the slight variation that in this case the shipowner provides its own stevedoring services. The District Court

for the Eastern District of New York (Edward R. Neaher, Judge) concluded that this variation requires according priority to the compensation lien. We disagree and therefore reverse.

Plaintiff-appellant, a longshoreman, was injured while working aboard a vessel owned by defendant-appellee Hellenic Lines. Since Hellenic Lines provides its own stevedoring services, Hellenic, as stevedore-employer, paid plaintiff $13,544.91 in compensation for his injury. Thereafter, plaintiff sued Hellenic in its capacity as shipowner and recovered a verdict of $17,150 against which Hellenic asserted its compensation lien in the amount of $13,544.91. Plaintiff's attorney, relying on Valentino, applied to receive his fee of $7,109.36 as a first charge against the judgment.

The District Court gave priority to Hellenic's compensation lien and awarded plaintiff's attorney $3,595.09 -- the remainder of the judgment after deducting the stevedore's compensation lien. Judge Neaher pointed out that Valentino had based priority of the attorney's lien partially on the common fund doctrine, the equitable principle that one who creates a fund for the benefit of others is entitled to be paid from that fund, see Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). That principle, Judge Neaher concluded, is inapplicable to this case, where the shipowner and the stevedore are the same entity, because the attorney's efforts will never create any benefit for the stevedore: whatever dollars it recoups for its compensation lien are being

paid by it as defendant in the negligence action.

Judge Neaher also pointed out that prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. (1976), the longshoreman's negligence suit usually conferred no benefit on the stevedore, but instead exposed it to substantial third-party liability in an indemnity action brought by the vessel owner. See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). The existence of the Ryan indemnity action created a conflict of interest between longshoreman and stevedore that led some courts to rule that the stevedore's compensation lien was to be satisfied in full before the lien of the longshoreman's attorney. Spano

v. N.V. Stoomvaart Maatschappij "Nederland", 340 F. Supp 1194 (S.D. N.Y. 1971); Russo v. Flota Mercante Grancolombiana, 303 F. Supp. 1404 (S.D.N.Y. 1969). In Valentino we concluded that abolition of the Ryan indemnity action required disapproval of Spano and Russo. 552 F.2d at 470. In this case, however, Judge Neaher thought that the identity between the vessel owner and the stevedore created a conflict of interest between longshoreman and stevedore similar to the situation that existed prior to the 1972 Amendments and similarly called for priority for the compensation lien.

We agree with the District Court that the common fund rationale provides no support for priority of the attorney's lien when the shipowner and the stevedore are the same entity.

However, in light of the Supreme Court's opinion in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980), we conclude that priority for the attorney's lien, in both the Valentino situation and the case before us, is supported directly by the statutory scheme of the LHWCA and its legislative history.

Unlike the issue we face here concerning the priority of the compensation lien, the issue before the Supreme Court in Bloomer was the amount of the lien. Specifically, the issue was whether, in the typical three-party situation, the amount of the compensation lien should be reduced by a proportionate share of the longshoreman's legal fees and expenses. In Bloomer, both the stevedore and the longshoreman agreed

that expenses, including legal fees, were first charges against the negligence recovery, 445 U.S. at 76 n.2. The longshoreman's claim was that his net recovery (negligence judgment less attorney's fee and expenses) should be increased by a proportionate share of the attorney's fee and expenses, with the increase supplied by a corresponding decrease in the compensation lien.[1] Though the issue before us differs from the issue in Bloomer, we think the Supreme Court's approach to the problem, and particularly its analysis of the legislative history of the LHWCA, leads to a conclusion that the compensation lien applies only to the longshoreman's net proceeds from the negligence suit, after deduction of litigation expenses and a reasonable

attorney's fee.

First, the Court pointed out that the purpose of the judicially recognized subrogation claim of the stevedore to recoup its compenstion payment from the longshoreman's negligence judgment was to prevent double recovery by the longshoreman. Id. at 79. That purpose would be partially undermined if the longshoreman could increase his net recovery by receiving from the stevedore a proportionate share of the legal fee and expenses incurred in the negligence suit. The longshoreman's net recovery, the Court concluded, must remain fully available to the stevedore's compensation lien, without diminution of that lien, but this reasoning recognizes that the compensation lien operates only upon the

longshoreman's net recovery.

Second, the Court observed that Congress, in amending the LHWCA in 1959 to eliminate all aspects of the longshoreman's election between compensation and negligence remedies, understood that the compensation lien operated only upon the longshoreman's net recovery in the negligence action. "[A]n employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery." S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959) (emphasis added), reprinted in [1959] U.S. Code Cong. & Ad. News 2134, 2135; see 445 U.S. at 81.[2] Moreover, as the Court pointed out, the House version of the 1959 amendment explicitly provided that the stevedore's lien on recovery from a third person came

"after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery," H.R. Rep. No. 229, 86th Cong., 1st Sess. 6 (1959) (italics omitted); the House passed this version, 105 Cong. Rec. 5561-62 (1959), but accepted the Senate version, 105 Cong. Rec. 15343 (1959), apparently satisfied that this version adequately continued existing judicial practice, 445 U.S. at 81-82 n.6. That practice included recognition of the fact that "[t]he expenses of securing the recovery is, as in equity it should be, a first charge against the fund itself." Fontana v. Pennsylvania R.R., 106 F. Supp. 461, 464 (S.D.N.Y. 1952) (Weinfeld, J.), aff'd sub nom. Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.), cert. denied, 346 U.S.

886 (1953).[3]

With the stevedore's compensation lien thus understood to reach only the longshoreman's net recovery in the negligence action, we see no reason to enlarge its scope to reach the gross amount of the recovery simply because in this case the shipowner is also the stevedore. The Supreme Court has recognized that Congress, in authorizing the longshoreman's negligence action, intended "that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979). In Valentino, we pointed out that

permitting the compensation lien to come ahead of the attorney's lien would deter counsel from pressing longshoremen's claims on a contingent fee basis except "where a recovery substantially in excess of the amount of the stevedore's lien is a virtual certainty." 552 F.2d at 469. We were unwilling to accept such deterrence in Valentino, and that concern remains just as valid when the shipowner and the stevedore are the same entity.

Since we view the compensation lien as reaching only the net proceeds from the negligence suit, we do not find decisive, as did many of the pre-1972 cases, whether the longshoreman's attorney has created a fund for the benefit of the stevedore of whether a conflict of interest between longshoreman and stevedore precludes the

"common fund" approach. If we were to pursue that inquiry, we would agree with Judge Neaher that Hellenic's decision to perform its own stevedoring services creates a conflict of interest similar to what existed before the Ryan indemnity action was abolished. However, the situation is not identical and does not require revival of the approach to attorney's fees taken in Spano and Russo. When the indemnity action existed, the stevedore had to pay not only compensation but also its own attorney's fee in defending against the shipowner's suit. That legal fee had been explicitly relied upon as one reason for giving the compensation lien priority over the attorney's fee of the longshoreman. Riddick v. Rederi A/B Fredrika, 271 F. Supp. 360, 360-61

(E.D. Va. 1967). However, Hellenic incurs only the legal fee to defend itself as vessel owner in the negligence action; it incurs no extra fee to defend a Ryan indemnity suit. Moreover, when the shipowner acts as its own stevedore, it may elect not to self-insure, in which event the compensation carrier, which has its own subrogation right, 33 U.S.C. §933 (h) (1976), is not adverse to the longshoreman and stands to benefit from the net negligence recovery. Now that Valentino has limited the compensation lien to the longshoreman's net recovery since the 1972 Amendments (whether or not it was so limited before, see Strachan Shipping Co. v. Melvin, 327 F.2d 83 (5th Cir. 1964)), we think that, in keeping with Edmonds, the scope of the lien should

not be varied by the happenstance of whether the stevedore and the vessel owner are the same, or whether the combined entity has a separate compensation carrier, or other factors irrelevant to the incentive of the longshoreman's attorney to bring the negligence action authorized by the Act. There are enough litigable issues in this area without opening up a new inquiry in each case as to whether the Valentino rule should be altered.[4]

Though Hellenic, as stevedore, views itself, like Ryan indemnitors, as being asked to pay the longshoreman's attorney for the privilege of being sued, it is more realistic to view Hellenic, as shipowner, to be paying the attorney because it was negligent toward his client. Moreover, the duty of care owed the longshoreman is

unaffected by the fact that Hellenic as shipowner elected to be its own stevedore. The mechanisms for securing compensation for breach of that duty should also be unaffected by Hellenic's preference not to contract for stevedoring services. Those mechanisms include a compensation lien limited to the net proceeds of the longshoreman's negligence recovery, after deduction of a reasonable attorney's fee and expenses.

The judgment is reversed and remanded for entry of a judgment consistent with this opinion.

FOOTNOTES

1. The proportionate share reduction, as claimed by the longshoreman, was calculated by reducing the amount of the compensation lien by the ratio that the attorney's fee and expenses bore to the total negligence judgment.

2. The Court also noted that "Congress did not intend to alter the rule allowing the stevedore to recover the full amount of its lien from the longshoreman's third-party recovery." 445 U.S. at 80-81. Since the very next sentence in the opinion quotes from the Senate Report's reference to an employer's reimbursement from "net" proceeds of the recovery, it seems evident that recovering the "full amount" of the compensation lien means use of the net proceeds, when they are sufficient to pay the compensation lien

in full, undiminished by the pro rata portion of the attorney's fee that Bloomer sought for himself.

3. Fontana concerned only the issue, ultimately resolved in Bloomer, whether the compensation lien should be reduced by a pro rata share of the attorney's fee as a first charge upon the negligence award. See Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026, 1034 n.13 (5th Cir.), cert. denied, 412 U.S. 949 (1973). Subsequent cases relied on Fontana not only to disallow pro rata decrease of the compensation lien when the negligence award was large enough to cover both the attorney's fee and the compensation lien, Davis v. United States Lines Co., 253 F.2d 262 (3rd Cir. 1958); In re Sheffield Tankers Corp., 222 F. Supp. 441 (N.D. Cal.

1963); Oleszczuk v. Calmar S.S. Corp., 163 F. Supp. 370 (D. Md. 1958), but also to give priority to the compensation lien when the negligence award was too small to cover both the lien and the attorney's fee, Haynes v. Rederi A/S Aladdin, 362 F.2d 345, 350-51 (5th Cir. 1966) (noting stevedore's employment of its own attorneys to protect its lien), cert. denied, 385 U.S. 1020 (1967); Spano v. N.V. Stoomvaart Maatschappij "Nederland", supra; Russo v. Flota Mercante Grancolombiana, supra.

4. Of course, the reasonableness of the attorney's fee may be challenged, lest it encroach unduly on the net proceeds subject to the compensation lien. The fee of approximately one-third of a modest verdict has not been challenged as unreasonable in this

case. By contrast, the examples offered by Judge Brown to illustrate undesirable consequences of the Fifth Circuit's pre-1972 decision to limit the compensation lien to the net recovery are premised on a 40% attorney's fee applied to substantial recoveries. Strachan Shipping Co. v. Melvin, supra, 327 F.2d at 89 n.9, 90 n.11, 93 n.20 (Brown, J., dissenting.)

KEARSE, Circuit Judge (concurring):

UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

While I believe the granting of priority to the attorney's lien produces an inequitable result when the shipowner is its own stevedore and the suit yields less than the amount the defendant has already paid the longshoreman as compensation plus the fees of the attorney to bring suit, I concur in the judgment on the basis of the legislative history of the 1959 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 86-171, 73 Stat. 391 (amending 33 U.S.C. §933), discussed in the majority opinion, ante, which suggests that Congress

intended the attorney's lien to have priority.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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SALVATORE INCORVAIA, :

Plaintiff, : 77 C 94

-against- :

HELLENIC LINES, LTD., :

"GRIGORIOS-C-IV," :

Defendant. :

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MEMORANDUM ORDER

Following a jury verdict in this action brought under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. §§901 et seq. ("the Act"), judgment was entered for plaintiff in the amount of $17,150 for injuries received while he was working on defendant's vessel. Prior to trial, plaintiff had been paid $13,554.91 in compensation and medical benefits by his employer, who now claims

a lien in that amount against the recovery. Plaintiff's attorney also claims $7,109.36 against the recovery for his fee and disbursements and has applied to the court for an order directing defendant to make such payment.

This case is unusual in that the defendant vessel owner was also plaintiff's employer.[1] Thus, the question arises whether an employer's compensation lien takes precedence over a plaintiff's attorney's lien where the self-insured vessel employed the longshoreman and the recovery is not sufficient to fully satisfy both liens. For the reasons which follow, the court is of the opinion that under the circumstances of this case the employer's lien is to be accorded priority.

The statutory scheme governing the work-related injuries of longshoremen was the subject of sweeping amendments

in 1972. Briefly outlined, the Act entitles a longshoreman to prompt compensation and medical payments from his stevedore-employer for injuries occurring on the navigable waters of the United States. 33 U.S.C. §§901 et seq. The longshoreman may also bring an action for negligence against the third-party owner of the vessel on which the injury occurred. Id. §933(a). Any recovery in that suit is subject to the stevedore's judicially created lien in the amount of compensation and medical payments previously made. See Bloomer v. Liberty Mutual Ins. Co., ___ U.S.___, 100 S.Ct. 925, 928 (1980). If the longshoreman fails to bring such an action within six months of receipt of the compensation award, his claim is then assigned to the stevedore. 33 U.S.C. §933(b). See Rodriguez v. Compass Shipping Co. Ltd., 617 F.2d 955 (2d Cir.),

cert. granted, 49 U.S.L.W. 3211 (October 6, 1980). Although the Act provides for distribution of a recovery obtained in the stevedore's assigned action, id. §933(e)[2], it is silent regarding the distribution of a judgment obtained by the longshoreman himself against the vessel owner, and in such situations the courts are called upon to fashion rules that complement the statutory scheme and accord with the equities of the parties. See, e.g., Cella v. Partenreederei MS Ravenna, 529 F.2d 15,20 (1st Cir. 1975), cert. denied, 425 U.S. 975 (1976).

The Court of Appeals for this Circuit in 1977 laid down a rule for the priority of liens in a case involving the usual context of a longshoreman's action under the amended Act -- where the vessel owner and the stevedore-employer are distinct entitles and the latter is not a party to the suit. In

Valentino v. Rickners Rhederei, G.M.B.H., 552 F.2d 466 (2d Cir. 1977), it was held that the longshoreman's attorney's lien has priority over the employer's compensation lien, with the longshoreman, who had already collected compensation payments, receiving whatever may remain. See Bloomer v. Liberty Mutual Ins. Co., supra, 100 S.Ct. at 932 n.13. This priority scheme prevails even where the recovery is insufficient to satisfy the liens of both the attorney and the employer and may result in the longshoreman himself receiving nothing out of the judgment. Valentino, supra, 552 F. 2d at 467-68 & n.2.

The rationale for this decision was based upon the

> "well-established principle of equity that a lawyer who creates a fund for the benefit of another is entitled to reasonable compensation for his efforts. Sprague v. Ticonic Nat'l Bank,

> 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026 (5th Cir.) (Wisdom, J.), cert. denied, 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973)."
> Valentino, supra, 552 F.2d at 468-69.

Thus, it is equitable to charge the employer with the expenses of securing the recovery out of which he receives the benefit of recoupment of compensation payments previously made. In addition, the court noted that if the employer had instituted the action against the vessel owner, pursuant to the statutory assignment of the longshoreman's claim, it would constitute a first lien on the recovery. The court saw no valid reason for departing from the statutory scheme set forth in 33 U.S.C. §933(e) and directing a different result when the longshoreman pursues his own statutory remedy than when the stevedore-employer does so for him. Id.

The court in Valentino also relied on the fact that prior to the 1972 amendments, a vessel owner sued by a longshoreman was permitted to being a third-party action against the employer seeking indemnity for any judgment secured by the injured longshoreman. See Ryan Stevedoring Co. v. PanAtlantic S.S. Corp. 350 U.S. 124 (1956). Under those circumstances, the longshoreman's suit conferred little or, more usually, no benefit upon the employer because it exposed him to substantial third-party liability. "The net result in most cases was that the stevedore became liable without fault for injuries to its employees." Valentino, supra, 552 F.2d at 468. See Swift v. Bolton, 517 F.2d 368, 369-79 (5th Cir. 1975). Accordingly, it was the view of the pre-1972 amendment decisions that "to impose a fee in such a case was to charge the stevedore for the

privilege of being sued." Valentino, supra, 552 F.2d at 470. Since the longshoreman and his employer had conflicting interests, see Swift v. Bolton, supra, 517 F.2d at 369-70, discussing Ballwanz v. Jarka Corporation of Baltimore, 382 F.2d 433 (4th Cir. 1967); but compare Chouest v. A & P Boat Rentals, Inc., supra, 472 F.2d at 1032, the equitable principle embodied in Sprague v. Ticonic Nat'l Bank, supra, was considered inapplicable.

The 1972 amendment, however, abolished the vessel's right to indemnity and vested the longshoreman and his employer with common interests arising out of the fact that the greater the former's recovery against the vessel the greater the change that the compensation lien would be satisfied in full. The effect of this realignment, later incorporated into the rationale of the Court of

Appeals in Valentino, had been described by the district court below:

> "The 1972 amendments mean that there is an undeniable benefit to the stevedore. A res is created out of which a fee can reasonably be paid." Valentino v. Rickners Rhederei G.M.B.H., 417 F. Supp. 176, 181 (E.D.N.Y. 1976). (Emphasis supplied.)

In the case at bar, although there exists a somewhat different divergence of interests between the longshoreman and his employer than in the pre-amendment cases, defendant argues that it nonetheless finds itself in the awkward position of being asked to underwrite a lawsuit from which it cannot hope to benefit. It is true that Hellenic Lines, as employer and self-insurer, will not in any real sense recoup its compensation payments out of the recovery against Hellenic Lines as self-insured vessel owner. Since such a "recoupment" would in reality be little more than the trans-

fer of funds from one pocket to another, it cannot be said that the employer here derives a benefit as an incident of plaintiff's attorney's efforts. Rather, the circumstance that the vessel owner is also employer makes this case more similar to the pre-amendment situations where the longshoreman and his employer were considered to have had adverse interests.

Nor is it clear that this is a case where the court's decision may be guided by the explicit statutory provision for distribution of a recovery obtained in an action brought by the stevedore-employer. 33 U.S.C. §933(e). Even if plaintiff had failed to bring suit within six months and his claim had been statutorily assigned, Hellenic Lines, as assignee-employer would have been unable to pursue a claim for recoupment against itself -- Hellenic Lines as vessel owner.

See Czaplicki v. The S.S. Heogh Silvercloud, 351 U.S. 525 (1956).[3]

In light of all the foregoing, this case boils down to one where the court is being asked to compel defendant to pay "for the privilege of being sued" in an action where no benefit will inure to either the stevedore or the injured longshoreman himself. It is the court's view that a rigid application to the facts of this case of the rule announced for the Valentino situation would do violence to the very equitable principles that were considered to require the result reached by the Court of Appeals in that case. Nor are we able to believe this would be in keeping with the intent of the 1972 amendments to reduce the potential liability and considerable legal expenses of employers "to assure that stevedores would have sufficient funds to pay vastly increased compensa-

tion benefits to longshoremen." Bloomer v. Liberty Mutual Ins. Co., supra, 100 S.Ct. at 930-32 & n.11.[4]

At the same time, the court is mindful that it is the aim of the Act to provide longshoremen with workers' compensation without depriving them of their right to be made whole for their injuries by negligent third parties, and without eliminating the incentive for third parties to provide longshoremen with a safe place to work. We would therefore not want to produce a result that might tend to "discourage counsel from pressing longshoremen's claims on a contengent fee basis in all cases, save those where a recovery substantially in excess of the amount of the stevedore's lien is a virtual certainty." Valentino, supra, 552 F.2d at 469. On the facts of this case, however -- and particularly since the excess of the recovery over

the compensation lien will allow an attorney's fee that is far from nominal -- we cannot say that today's decision will unfairly discourage the bringing of longshoremen's actions. Moreover, unlike Valentino, this case presents compelling equitable reasons why the attorney's lien should not be granted priority.

Accordingly, plaintiff's attorney's application is denied. Hellenic Lines is directed to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien.

SO ORDERED.

The Clerk of the Court is directed to enter judgment in accordance with this memorandum order and to forward copies of this memorandum order to counsel for the parties.

_____

U.S.D.J.

Dated: Brooklyn, New York
November 7, 1970

[1] Where the longshoreman is employed by the vessel, the Act allows an exception to the general rule that an employee who has received compensation benefits from his employer may not bring an action against the latter. Reflecting settled case law, however, see Edmonds v. Compagnie Generale Transatlantique, ___ U.S. ___, 99 S.Ct. 2753, 2758-89 & n.13, and Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976), 33 U.S.C. §905(b) permits an action only for injuries not "caused by the negligence of persons engaged in providing stevedoring services."

[2] Out of the recovery against the vessel owner in such an action, the stevedore-employer retains his costs of litigation, including a reasonable attorney's fee, and the amounts of compensation and medical payments previously paid to the longshoreman. Of any excess, four fifths shall be paid to the longshoreman, and one fifth "shall belong to the employer." 33 U.S.C. §933(e).

[3] Since plaintiff here did timely institute his action, of course, the question is not presented, and we express no opinion, regarding whether under these circumstances there could be an exception to the statutory assignment of claim. 33 U.S.C. §933(b). See Rodriguez v. Compass Shipping Co., Ltd., 617 F.2d 955, 960-61 (2d Cir. 1980).

[4] Indeed, the Supreme Court noted that in amending the Act in 1972 Congress recognized the importance of adjusting the role played by "longshoremen's lawyers, who were found to have been

the primary beneficiaries of third-party actions in the past." Id. In the peculiar situation presented here, the longshoreman's lawyer will be the only beneficiary of this third-party action.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January, one thousand nine hundred and eighty-two.

Present:

HON. JON O. NEWMAN,
HON. AMALYA L. KEARSE,
Circuit Judges
HON. WARREN W. EGINTON,
District Judge

SALVATORE INCORVAIA,

Plaintiff-Appellant,

-v-

#81-7099

HELLENIC LINES, LTD.,
"Grigorios-C-IV"

Defendant-Appellee.

United States Court of Appeals, Second Circuit, Filed Jan. 5, 1982, A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro, Clerk

by Arthur Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of March, one thousand nine hundred and eighty-two.

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SALVATORE INCORVAIA,

Plaintiff-Appellant,

-v- No. 81-7099

HELLENIC LINES, LTD.,

"GRIGORIOS-C-IV,"

Defendant-Appellee.

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A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the defendant-appellee, Hellenic Lines, Ltd., "Grigorios-C-IV", and an amicus curiae brief having been

filed in support of the petition for rehearing and suggestion for rehearing in banc by counsel for Sea-Land Service, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed March 11, 1982
A. Daniel Fusaro, Clerk

UNITED STATES COURT OF APPEALS

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SALVATORE INCORVAIA,

Plaintiff-Appellant,

-against-

HELLENIC LINES LTD.,

Defendant-Appellee.

----------X

Docket No. 81-7099

NOTICE OF MOTION

for Recalling of Mandate
and Staying Further
Mandate Pending Petition
for Certiorari

Motion by:
Zock, Petrie, Reid & Curtin
Edwin K. Reid
(212) 425-0310

Opposing Counsel:
Irving Bushlow, Esq.
(212) 625-1336

United States Court of Appeals
Filed
March 29, 1982
A. Daniel Fusaro, Clerk
Second Circuit

Has a request of opposing counsel for consent been refused? YES

Has service been effected? YES

Is oral argument desired? NO

Requested Return Dated: April 8, 1982

Date of Argument of appeal, if scheduled:

Judge or Agency whose order is being appealed:

Judges Newman, Kearse & Eginton

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? NO

Would expedited appeal eliminate need for this motion? NO

If no, explain why not.

Mandate already issued.

Brief Statement of the relief requested:

Recalling mandate issued March 18, 1982 after re-hearing denial and staying further mandate.

Previous requests for similar relief and disposition:

None

Statement of the issue (s) presented by this motion:

Should mandate be recalled and any further mandate stayed pending filing petition for certiorari?

Brief Statement of the facts:

Petition for re-hearing was denied March 11, 1982 so that a mandate was issued March 18, 1982. According to plaintiff-appellant's calculations, judgment currently stands at $8,956.79.

Summary of the argument:

Relief is permissible pursuant to Federal Rules of Appellate Procedure 26 (b) and 41 (b). Notice of re-hearing denial was received on March 15, 1982 and mandate issued three days later. During both periods the attorneys handling this appeal were actually engaged at trial.

Dated: 3/26/82

Edwin F. Lambert, Jr.
Attorney for Defendant-
Appellee

ORDER

It is hereby ordered that the motion be and it hereby is denied.

Dated: April 6, 1982

Jon O. Newman

Amalya L. Kearse

Warren W. Eginton

UNITED STATES COURT OF APPEALS
FILED
APR. 13, 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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SALVATORE INCORVAIA, :

Plaintiff, : 77 Civ.94

-against- :J. Neaher

HELLENIC LINES, LTD., :NOTICE OF APPEAL

"GRIGORIOS," :

Defendant. :

----------x

S I R S :

PLEASE TAKE NOTICE that plaintiff, Salvatore Incorvaia, appeals to the Court of Appeals for the Second Circuit, from the "amended judgment" of this court dated and filed December 31, 1980, which amended the judgment of this court dated February 15, 1979 and filed February 21, 1979, to the extent of directing the defendant Hellenic Lines, Ltd., to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the

recovery over the employer's compensation lien, said "amended judgment" having been made and filed pursuant to a memorandum and order of this court dated and filed on November 7, 1980 (Hon. Edward R. Neaher, District Judge), which denied the application of plaintiff's attorney for an order providing for the payment of said defendant to said attorney, against the recovery, of the sum of $6,252.50, plus disbursements in the sum of $856.86, totalling $7,109.36.

Dated: Brooklyn, New York

January 27, 1980

Yours, etc.,

IRVING B. BUSHLOW
Attorney for plaintiff
26 Court Street
Brooklyn, New York 11242

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed January 30, 1980
A. Daniel Fusaro, Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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SALVATORE INCORVAIA, :

Plaintiff-Appellant, :Docket No.

-against- :81-7099

HELLENIC LINES, LTD., :

"Grigorios V-IV", :

Defendant-Appellee. :

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that HELLENIC LINES, LTD., "Grigorios C-IV", the defendant-appellee above named, hereby appeals to the Supreme Court of the United States from the order denying the petition for re-hearing in banc entered in this action on March 11, 1982, after a decision of the United States Court of Appeals, Second Circuit, entered January 5, 1982, reversing a judgment of

the United States District Court, Eastern District, resulting in a judgment for the plaintiff.

This appeal is taken pursuant to 28 U.S.C. §1254.

Pursuant to U.S. Sup. Ct. Rule 28.5, 28 U.S.C. Rule 28, all parties required to be served have been served and counsel's names and addresses are listed below.

Dated: New York, New York
May 20, 1982

ZOCK, PETRIE, REID & CURTIN

By_____
Martin E. Coffey
Attorneys for Defendant-Appellee
Office and P.O. Address
19 Rector Street
New York, New York 10006
(212) 425-0310

TO:

Irving Bushlow, Esq.
Attorney for Plaintiff-Appellant
26 Court Street
Brooklyn, New York 11242

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.
77 C. 94

SALVATORE INCORVAIA

v.

HELLENIC LINES LTD.,
"Grigorios C-IV"

JUDGMENT

FILED IN CLERK'S
OFFICE, U.S.
DISTRICT COURT
E.D.N.Y.
FEB. 21, 1979

This action came on for trial before the Court and a jury, Honorable Edward R. Neaher, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff has established his claim that the defendant shipowner

was negligent and that its negligence was a proximate cause of plaintiff's accident,

that the defendant shipowner did not establish its claim that plaintiff was himself negligent and that negligence was a proximate cause of the accident,

that plaintiff shall recover $5,000 for pain and suffering from August 28, 1974 to date;

that plaintiff shall recover nothing for future pain and suffering;

that plaintiff shall recover $3,050 for medical and hospital expenses;

that plaintiff recover $9,100 for lost earnings prior to March 16, 1975;

that plaintiff recover nothing for any future diminished earning capacity.

Dated at Brooklyn, New York, this 15th day of February, 1979.

_____
Clerk of Court

_____
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

SALVATORE INCORVAIA, : AMENDED

Plaintiff, :JUDGMENT

-against- :77 C-94 (ERN)

HELLENIC LINES, LTD., "GRIGORIOS-C-IV", :

Defendant. :

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Filed in Clerk's Office, U.S. District Court, E.D.N.Y., December 31, 1980.

A memorandum and order of Honorable Edward R. Neaher, having been filed on November 7, 1980, denying plaintiff's attorney's application against the recovery for his fee and disbursements, directing Hellenic Lines to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien, and directing the Clerk of the Court to enter judgment accordingly, it is

ORDERED and ADJUDGED that plaintiff's attorney's application against the recovery for his fee and disbursement is denied; and that Hellenic Lines is hereby directed to pay to plaintiff's attorney the sum of $3,595.09, being the excess of the recovery over the employer's compensation lien.

_____
Clerk of Court

Dated: Brooklyn, New York
December 31, 1980